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Supreme Court of the United States,

OCTOBER TERM, [redacted] 1914

No. [redacted] 14

THE GEORGE N. PIERCE COMPANY,
Petitioner,

against

WELLS FARGO & COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

CHARLES W. PIERSON,
WILLIAM W. GREEN,
L. A. DOHERTY,
Of Counsel for Respondent.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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CASES CITED IN BRIEF.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 104.

THE GEORGE N. PIERCE COMPANY,
Petitioner,

v.

WELLS FARGO & COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT.

This case involves the validity of the fifty dollar valuation clause in an express receipt.

The receipt (which is identical in form with that involved in *Wells Fargo & Company* v. *Neiman-Marcus Co.*, 227 U. S., 469) is printed at pages 13–14 of the Record. The clause in question reads:

> "Nor in any event shall said Company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued unless a different value is herein-above stated."

Under this receipt plaintiff shipped certain automobiles and automobile parts worth upwards of $15,000 from Buffalo, N. Y., consigned to an address in San Francisco. The property was destroyed in a railroad wreck *en route*.

At the time of shipment plaintiffs were asked whether they wanted to put a valuation on the property and declined to do so, knowing that they would thereby obtain the lower rate applicable to the fifty dollar valuation contained in the express receipt (pp. 21, 23, 25).

Plaintiffs brought suit for the full value of the property. At the close of plaintiffs' case the trial court directed a verdict against the defendant for fifty dollars and interest (pp. 47–50).

On writ of error the Circuit Court of Appeals for the Second Circuit affirmed the judgment, Judge Noyes dissenting. The case comes here on writ of *certiorari* granted in October, 1911.

POINT I.

THE PRINCIPAL QUESTIONS INVOLVED IN THIS CASE HAVE BEEN DECIDED ADVERSELY TO PLAINTIFF IN THE RECENT CASES OF ADAMS EXPRESS CO. v. CRONINGER, 226 U. S., 491, AND WELLS FARGO & CO. v. NEIMAN-MARCUS CO., 227 U. S., 469.

These cases have been argued and decided since the writ of *certiorari* was granted herein. Both involved the validity of the fifty-dollar valuation clause

contained in an express company receipt. In both it was held, upon the authority of the leading case of *Hart* v. *Pennsylvania*, 112 U. S., 331, that an agreement in such a receipt limiting the amount recoverable by the shipper in case of loss to an agreed valuation is valid if fairly made for the purpose of applying to the shipment the lower of two rates based upon valuation. One of the cases (*Wells Fargo & Co.* v. *Neiman-Marcus Co.*) involved the identical form of receipt and valuation clause involved in the case at bar.

We assume that it is unnecessary to reargue any of the questions decided after great consideration in those cases, and shall confine our discussion to the features which may be claimed to differentiate the present case.

In both the cases cited the goods were delivered to the carrier enclosed in a sealed package, so that the carrier had no opportunity to form an estimate of their value. In the case at bar the goods were not so enclosed, and it was stipulated, subject to defendant's objection to the competency, relevancy and materiality of the testimony, that the property was obviously of a value in excess of fifty dollars and that defendant "knew that same was of a value largely in excess of a thousand dollars" (p. 13). The question is presented, therefore, whether knowledge by the carrier that the goods are actually worth more than the valuation agreed upon for the purpose of fixing the rate takes the case out of the rule laid down in *Hart* v. *Pennsylvania Railroad Company*, 112 U. S., 331, and followed in *Adams Express Co.* v. *Croninger* and *Wells Fargo & Co.* v. *Neiman-Marcus Co.* (*supra*). This we take to be the only question requiring serious discussion.

POINT II.

IN APPLYING THE RULE ENUNCIATED IN *Hart* v. *Pennsylvania Railroad Company*, 112 U. S., 331, IT IS IMMATERIAL WHETHER OR NOT THE CARRIER KNEW THAT THE AGREED VALUATION WAS LESS THAN THE ACTUAL VALUE, PROVIDED THE VALUATION WAS MADE FAIRLY AND IN GOOD FAITH FOR THE PURPOSE OF APPLYING TO THE SHIPMENT THE LOWER OF TWO RATES, AND WAS NOT ADOPTED AS A DEVICE FOR EVADING THE RULE OF LAW FORBIDDING A COMMON CARRIER TO STIPULATE FOR EXEMPTION FROM RESPONSIBILITY FOR ITS OWN NEGLIGENCE.

It has been erroneously assumed that this question (*i. e.*, the effect of knowledge on the part of the carrier) was not involved in the *Hart* case.

This assumption underlies the opinion of the dissenting judge below (see p. 64). It also underlies the opinion of Commissioner Lane in *Matter of Released Rates*, 13 I. C. C. R., 550, where it is asserted:

> "That decision (*i. e.*, *Hart* case) was expressly predicated upon the principle of estoppel; the shipper had misrepresented the value of his property, and had thereby secured the benefit of a lower rate than he was properly entitled to by virtue of the real value. He was estopped by his fraudulent conduct from recovering an amount in excess of the value he had declared."

An examination of the original record and briefs in the *Hart* case makes it clear that this assumption is mistaken. The shipment involved consisted of six race horses worth over $30,000. One horse alone was

worth \$15,000. The agreed valuation (which this court sustained) was \$200 apiece, or \$1,200 in all. Plaintiff testified in substance (Record in *Hart* case, pp. 28–30) that the officials who represented the defendant carrier in the transaction were familiar with the horses and knew their value. This testimony, while perhaps objectionable in form, was admitted without objection, was nowhere denied, and formed the basis of one of the chief arguments of counsel. In his brief for this court counsel for plaintiff in error called attention to the testimony and said (p. 11):

> "The following facts appear from the record and they are not contradicted:
>
> "(*a*) The property shipped was of much greater value than that named in the printed form of contract.
>
> "(*b*) *That the carrier or its authorized agents knew this before it received the stock for shipment.*" (Italics ours.)

Again, at page 14 of his brief:

> "Here no representation of value was required; no deception or misleading statement of value was made, *and the shipper knew the value of the property it was to carry, or knew that it was greatly in excess of the sums named in the bill of lading.*"

The question of the carrier's knowledge was therefore before this court and strongly urged upon its attention, and while it is not separately discussed in Justice Blatchford's opinion it must be deemed to have been considered and to be covered by the decision rendered. Read in the light of the record and briefs the opinion

shows that the decision was based, not on the theory of an estoppel arising from false representations, but on the broader theory of a *contract* made fairly and openly for the purpose of applying a particular rate.

The court said;

> "Although the horses, being race horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; * * *
>
> "If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight. It is further contended by the plaintiff that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence.
>
> "* * * The valuation named was the 'agreed valuation', the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.
>
> "* * * The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the car-

rier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

(112 U. S., at pp. 337, 338, 343.)

In *Blackwell* vs. *Southern Pac. Co.*, 184 Fed. Rep., 489 (Circuit Court, N. D., California), the principle for which we are contending was squarely affirmed and current misapprehensions as to what was actually decided in the *Hart* case were noted and discussed. This was an action to recover from the carrier the full value of certain consignments of spirits and whiskey shipped under a contract limiting the carrier's liability to an agreed valuation. The remarks of the Court are so pertinent to the case at bar that we quote somewhat at length and adopt them as part of our argument. The Court said (p. 490):

> "The evidence, however, is such as to indicate, if material, that, in making the contracts, the value of the goods was, with the knowledge of both parties, fixed without reference to their real value, but at a figure much less; and this fact has given rise to the only question in the case, the contention of the plaintiff being that, because with the carrier's knowledge such agreed value failed to equal or approximate the actual value, the case discloses an attempt to unlawfully limit the liability of the carrier, and that the contracts are therefore void as against public policy, and plaintiff entitled to recover his actual loss.
>
> "* * * It is claimed that, where it appears that the agreed value is so disproportionate to the actual as to show that the latter was wholly ignored, the contract must as matter of law, and no matter how free in fact from bad faith, be regarded as unfair and wanting in *bona*

> *fides*, and as having only the purpose of avoiding the legal liability of the carrier.
>
> "While some such limitation in the right of special carriage contracts has been recognized in certain of the states, the doctrine has never obtained in this state, nor does it accord with the principles announced on the subject by the Supreme Court of the United States. The facts do not make a case distinguishable in principle from that of Hart *v.* Penna. R. R. Co., 112 U. S., 331, 5 Sup. Ct., 151, 28 L. Ed., 717, which is conceded to be the leading case upon the subject in this country."

The Court proceeds to discuss at length the *Hart* case and the like case of *Donlon Bros.* v. *Southern Pacific Co.*, 151 Cal., 763, and continues (p. 493):

> "The attempt to distinguish those cases from the one at bar is unsuccessful. As we have seen, the rate in this case was made to depend upon the value of the commodity, that value being agreed upon for the purpose of securing the advantage of the lower rate, and in that respect this case is squarely with the doctrine as there stated.
>
> "The fact that the goods were in fact of greater value than that agreed upon is immaterial, and was so decided in the Donlon Case; and the fact that both the carrier and shipper knew that the actual value was greater than that stipulated is likewise immaterial, and was so considered in the Hart Case. The evidence here, as in those cases, fails to show that the contracts were not fairly made. While it is true that such a contract will not be enforced if unfair, that only means that the agreement must not have been procured from the shipper by the deceit or coercive action of the carrier; and, as we have seen, there is nothing of that nature appearing in the case."

Referring to the opinion in *Matter of Released Rates*, 13 I. C. C. R., 550, and especially so much thereof as purports to construe the *Hart* case, the Court continues (p. 494):

> "It is contended that, within the rule as thus stated, * * * the contracts involved should be held void as entered into collusively and in bad faith, since both parties knew of the disparity between the actual and the stipulated value of the goods shipped; and it may be conceded that, if the proposition as there put embodies a correct statement of the law, that result should follow. But it is at once apparent that the views there advanced are based upon the authority of certain state decisions where such doctrine prevails and the theory that the decision in the Hart case is not opposed thereto. In other words, the opinion construes the latter case as having no application to an instance where both parties to such a contract are aware that they are stipulating to a value greatly disproportionate to the actual value of the property. This is plain since it is said in effect that the carrier in that case did not know the value of the property to be other than as stated in the bill of lading; and it is explicitly stated that the decision was 'expressly predicated upon the principle of estoppel' because of the fraudulent misrepresentation of the value by the shipper.
>
> "A careful reading of the opinion in that case will disclose that this statement involves an obviously erroneous conception of the ground on which the conclusion of the Supreme Court was rested. While the court discusses, with other elements, the effect of misrepresentation or concealment as to value in making such a contract, it does not base its decision upon the existence of any such element in that case. Indeed, upon the facts as stated, no such element was there shown. The court bases its conclusion

> squarely upon the proposition that the shipper was concluded by his contract; * * *
>
> "From this it is certain that, as stated above, the question of the carrier's knowledge of the real value of the goods, where the contract is otherwise fair, is regarded by the Supreme Court as a wholly immaterial factor. The views of the Interstate Commerce Commission as above expressed are therefore out of harmony with the principles announced by the Supreme Court in that case."

In conclusion we submit that the very existence of the right to maintain two rates based on valuation on the same commodity—a right well established by decisions of this Court—presupposes that the parties may with full knowledge lawfully agree on a valuation below the actual value. Full responsibility, for which the higher rate is charged, cannot in any event exceed the actual value, and if the parties were unable lawfully to agree on a valuation substantially below actual value there would be no occasion for a lower rate and no inducement to the carrier to make it, (except in the limited class of cases where the carrier does not know what it is carrying).

POINT III.

THE VALUATION IN THIS CASE WAS FAIRLY MADE FOR THE PURPOSE OF APPLYING TO THE SHIPMENT THE LOWER OF TWO RATES AND NOT FOR ANY ULTERIOR PURPOSE.

It may be conceded that if the agreed valuation were a mere pretense devised by the carrier to nullify

the rule of law and public policy forbidding it to stipulate for exemption from liability for its own negligence, it would be the duty of the court to bring the scheme to naught and enforce the rule of law. That, however, is not the situation here. There is no evidence of any scheme or intent on the part of the carrier to nullify or evade the law. It is matter of common knowledge that fifty dollars is the conventional and standard valuation adopted by express companies and printed in their receipts as a basis for their primary or lowest rate. Taking the nature of the express business into account it is a substantial sum and not an undervaluation or attempted evasion. In the majority of cases it probably represents at least the full value of the article carried.

In the present case this standard or conventional valuation was deliberately adopted by the shipper. It was not imposed upon the shipper by the carrier. The shipper was familiar with defendant's tariffs (p. 18). It knew that the express company's charge would be higher if the true value were declared (p. 23). The person who represented the shipper in the transaction expressly declined, in answer to a special inquiry from the carrier's representative, to put any valuation on the shipment (pp. 21, 22). This was in accordance with explicit orders from the shipper. "Orders had been given to me to that effect, that I should not put any valuation on the shipments going by express. Our Treasurer gave me those orders" (p. 25).

The dissenting opinion below suggests (p. 63) that if the fifty dollar valuation in this case be sustained

"any sum may be named as the value of any property. * * * Exemption may be obtained by going through a form of words—by 'valuing' the most valuable article at a penny!" It would seem a sufficient answer to point out that the parties here did not value the shipment at a penny but at the well-known valuation universally adopted by express companies as the basis for their primary or lowest rate, and to suggest that it will be time enough to discuss the effect of a valuation fixed for purposes of evasion when some case arises which presents evidence of an effort or intent to evade the law.

POINT IV.

THE EQUITIES ARE ALL WITH RESPONDENT. TO PERMIT PETITIONER TO RECOVER THE FULL VALUE OF THE SHIPMENT WOULD WORK GRAVE INJUSTICE AS BETWEEN THE PARTIES AND BE CONTRARY TO PUBLIC POLICY.

This is not the case of a weak or ignorant shipper coerced or deluded by the carrier into an unfair agreement. The shipper is a powerful corporation and entered into the agreement after careful and deliberate forethought. Petitioner had previously sent its carload lots to the Pacific Coast by freight (p. 21), but decided it could do better by shipping by express, refusing to give a valuation and thereby securing the rate applicable to the express companies' standard or conventional valuation of fifty dollars. Petitioner had formerly been in the habit of

declaring values, but had discontinued the practice, apparently on the theory that under various decisions of state courts and the ruling of this Court in the Hughes case (191 U. S., 477), it could get the lowest rate and still hold the carrier for full value in case of loss. Petitioner's representative testified: "I told him I understood the law was that the transportation company was responsible for stuff after they accepted it and gave us a receipt for it" (p. 25). Be this as it may, however, it clearly appears that the action of the shipper in refusing to declare the value of the shipment was taken with deliberate forethought and was not induced by anything done or said on behalf of the carrier. In fact the carrier's representative had some doubt about the transaction and made special inquiry whether the shipper wished to put a valuation on the shipment—to which the shipper answered, "No"—and whether the shipment was already covered by insurance—to which the shipper answered, "Yes" (p. 22). (Petitioner now claims that this statement as to insurance was an inadvertence, but the explanation offered is lame, and the fact remains that the carrier believed the statement and was expected to believe it.)

Under these circumstances, it would work injustice and encourage unfair dealing to permit petitioner to recover the full value claimed.

The rule of public policy invoked by petitioner—*i. e.*, that a carrier may not lawfully stipulate for exemption from responsibility for negligence, was built up as a protection for the weak—for the ordinary shipper and citizen who deals with a carrier at a disadvantage. It

was never intended as a weapon in the hands of the strong and sophisticated.

As already suggested the vindication of this rule of public policy may well be left for some case coming within the reason of the rule and presenting evidence of actual intent on the part of the carrier to violate it. Under the circumstances of the case at bar (to quote from the prevailing opinion below), "It would be in the highest degree violative of public policy to permit a shipper, who has pecuniarily benefited by the valuation he has deliberately agreed upon, to repudiate his agreement and recover against the carrier on a higher valuation."

POINT V.

If it be claimed that the transactions in suit involved a violation of the Interstate Commerce Acts we reply that in that case the parties are in pari delicto and the Court will leave them where it finds them.

Without conceding that the transactions in suit did in fact involve any violation of the Interstate Commerce Acts, and disclaiming any intent on the part of the carrier to violate those statutes, we nevertheless proceed to point out the legal consequences if such violation be deemed to exist.

The prohibitions against false billing, discriminations and preferences contained in the Interstate Commerce Acts apply to carrier and shipper alike. What

is unlawful for the one to give is equally unlawful for the other to receive.

Section 10 of the original Interstate Commerce Act as amended (25 Stat., 855, c. 382) provides that

> "Any common carrier subject to the provisions of this Act * * * who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, &c."

It also provides:

> "Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, &c."

The Elkins Act, as amended by Section 2 of the Act of June 29, 1906 (34 Stat., 584, c. 3591) provides:

> "It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to

> solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor."

In *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S., 155, this Court reversed a judgment of the Supreme Court of Illinois in favor of a shipper, and held that relief must be denied on the ground that the contract sued upon involved a discrimination, and as such a violation of the Elkins Act.

In *M. K. & T. Ry. Co.* v. *Harriman*, 227 U. S., 657, the Court said, at page 671:

> "When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act."

In *Ellison* v. *Adams Express Co.*, 245 Ill., 410, goods worth considerably over $50 had been delivered to the Express Company for carriage, under a receipt containing the fifty dollar valuation clause. As in the case at bar the shipper knew that the rate charged would be based upon the valuation and refrained from declaring a greater value. The goods having been lost plaintiff brought suit against the carrier and recovered judgment for their full value. The Supreme Court of Illinois reversed this judgment on the ground that it was founded upon a contract in violation of the Interstate Commerce Act. In the course of its opinion the court said:

> "Courts of justice will not assist parties who have participated in a transaction forbidden by statute to assert rights growing out of it. There can be no right of recovery upon a contract which is against good morals, forbidden by law or opposed to public policy. The law will not lend its aid to enforce a demand having its origin in a breach of the law itself."
>
> * * * * * *
>
> "The general rule is undoubted which was stated by Lord Mansfield in the case of Holman *v.* Johnson, Cowp., 341: 'The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' No person who has participated in a transaction forbidden by statute will be allowed to assert rights growing out of it. 'Whether the form of action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part' (Hall *v.* Corcoran, 107 Mass., 251)."
>
> * * * * *

"The appellees' action, when all the facts are disclosed, is founded upon a contract knowingly entered into in violation of law. Whatever the form of action, whether in contract or tort, it had its basis in the contract of carriage. The wrong complained of is the breach of the illegal contract by which the appellees put their property into the possession of the appellant. That contract was not only a fraud on the appellant, but an intentional evasion of the Interstate Commerce Act."

In the *Kirby* case (225 U. S., 155) there is a suggestion (see p. 166) that if the declaration had contained a count based upon *negligence* and the judgment had been rested upon that ground and not on breach of contract, there might have been a recovery under the decision in *Merchants' Cotton Press, &c., Co.* v. *Insurance Co.*, 151 U. S., 368, 388. That suggestion cannot avail petitioner here, however, because

(a) The cause of action in the case cited (151 U. S., 368), arose in 1887, before the amendments of the Interstate Commerce Laws making rebates and preferences unlawful on the part of the shipper as well as the carrier.

(b) In the case at bar petitioner must be deemed to have elected to proceed on the theory of a breach of contract. For petitioner put in evidence the express receipt of special contract (p. 13), and on no other theory was this relevant or material evidence for plaintiff. It was not necessary in order to prove delivery of the goods to the carrier, for that was expressly

admitted (pp. 12–13). Nor was it material or relevant to a cause of action for negligence or conversion.

(c) In any event, as pointed out by the Supreme Court of Illinois in the *Ellison* case *supra* (245, Ill. 410), "Whether the form of action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part. * * * The appellees' action, when all the facts are disclosed, is founded upon a contract knowingly entered into in violation of law. Whatever the form of action, whether in contract or tort, it had its basis in the contract of carriage."

This, we submit, is sound reason and sound law. To hold otherwise would be to permit an important question of public policy to turn on the merely technical matter of the form of a pleading.

POINT VI.

PETITIONER'S BRIEF CONTAINS AN UNWARRANTED ASSUMPTION OF FACT AND BASES ARGUMENT THEREON; OTHERWISE IT REQUIRES LITTLE BY WAY OF REPLY IN ADDITION TO WHAT HAS ALREADY BEEN SAID.

The unwarranted assumption of fact. In the statement prefixed to petitioner's brief it is asserted, in substance (p. 6), that no rate was ever agreed upon or paid and that the rate was to be paid by the consignee.

Argument based on these alleged facts will be found at various places in the brief (see *e. g.*, p. 37).

The record will be searched in vain for any proof of these assertions. On the contrary there is direct evidence that the rate had been agreed upon. "It was our Pacific Coast representative who ordered a shipment by carload to the Coast by express. * * * They got a rate out at the Coast first and they advised us by letter how much it would be" (Record, p. 21).

We proceed to comment briefly on Petitioner's Points in the order of their statement.

In Point I of Petitioner's Brief a distinction is asserted to exist between cases where a discrepancy between the agreed valuation and the actual value appears on the face of the contract, and cases where the carrier obtains its knowledge of the undervaluation from evidence outside the contract, and the *Hart* case is sought to be distinguished on the ground that "it did not appear *on the face of the bill of lading* that the agreed valuation did not equal or exceed the actual value." We submit that there is nothing in this alleged distinction, and that if the carrier had actual knowledge of the facts it is immaterial whether that knowledge was obtained from the contract itself or from evidence *dehors* the contract.

With regard to the cases cited in Petitioner's Brief (p. 23, *et seq.*), as "recognizing the principle that a fictitious valuation is an exemption," it suffices to say that these cases, in so far as they conflict with the proposition for which we are contending, are either decisions

in which there was no "agreed valuation," the stipulation amounting merely to an exemption from liability, or are based on the misapprehension already noted (see Point II, *supra*) as to what the *Hart* case actually decided.

Petitioner's Point II, based on the use in the express receipt of the phrase "gross negligence", is sufficiently answered in the prevailing opinion below (see Record, pp. 59, 61). Moreover, as has already been pointed out, the recent decision in *Wells Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S., 469, sustained the validity of a receipt identical in phraseology.

Petitioner's Point III, as to the effect of a false valuation under the Interstate Commerce Act, proceeds on the assumption of fact that no rate was ever agreed upon or paid. As already pointed out, this assumption is unwarranted. Otherwise the Point is disposed of by what has been said in Point V of this brief. If there were any violation of the Interstate Commerce Act it was a violation by the shipper as well as the earrier, and the parties are *in pari delicto*.

As to Petitioner's Point V, alleging a conversion of the metal salvage from the fire, we reply:

(*a*) No such cause of action was pleaded.

(*b*) There is no evidence on which the jury could have found that the alleged salvage had any value (see, *e.g.*, Record, p. 38).

(*c*) The express receipt provided, "Nor *in any event* shall said company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued."

POINT VII.

The judgment should be affirmed.

Charles W. Pierson,
William W. Green,
L. A. Doherty,
Of Counsel.

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Supreme Court of the United States,

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No. 14.

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against

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT ON REARGUMENT.

CHARLES W. PIERSON,
CHARLES W. STOCKTON,
WILLIAM W. GREEN,
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LIST OF CASES.

(Indexed to names of both parties.)

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT ON REARGUMENT.

Statement.

This case involves the validity of the fifty dollar limitation in an express receipt or bill of lading.

The receipt (which is identical in form with that involved in *Wells Fargo & Company* v. *Neiman-Marcus Co.*, 227 U. S., 469) is printed at pages 13-14 of the Record. The clause in question reads:

> "Nor in any event shall said Company be held liable beyond the sum of Fifty Dollars,

at not exceeding which sum the said property is hereby valued unless a different value is hereinabove stated."

Under this receipt petitioner (plaintiff below who will hereinafter be referred to as plaintiff) delivered to respondent (who will hereinafter be referred to as defendant) a carload of automobiles and automobile parts to be carried from Buffalo, N. Y., to San Francisco. The property was destroyed *en route* in a railroad wreck on the line of the Atchison, Topeka & Santa Fe Railway near Norborne, Missouri.

As the case was disposed of at the close of plaintiff's evidence, defendant's tariff schedules as filed and published did not get into the Record. It sufficiently appears, however, that defendant's rates were based on valuation (p. 23) and that the rate agreed upon with plaintiff for the shipment in question was the regular merchandise rate applicable to a valuation of fifty dollars (p. 21).

The form of express receipt was familiar to the shippers and was detached from a book of similar receipts in their possession (p. 13). They were familiar with defendant's tariffs (p. 18). At the time of shipment the shippers were asked whether they wanted to put a valuation on the property and expressly declined to do so (p. 22). They knew that defendant's charge was based on valuation and would be higher if the true value was declared (p. 23). They had formerly been in the habit of declaring values on the shipments, but had discontinued the practice (p. 25).

Suit was brought for the full value of the property stipulated on the trial to have been $15,487.06. At the close of plaintiff's case the Trial Court directed a verdict against the defendant for $50 and interest, liability to that extent being conceded (pp. 46-50). On writ of error the Circuit Court of Appeals for the Second Circuit affirmed the judgment, Judge Noyes dissenting (see opinion of Court, p. 58 *et seq.*, dissenting opinion, p. 62 *et seq.*). The decision below is reported in 189 Fed., 561. The case comes here on writ of *certiorari* granted in October, 1911 (p. 66). It was originally argued on December 8th, 1913. On October 26, 1914, an order was entered restoring the case to the docket for reargument.

PRELIMINARY POINT.

The cases of Adams Express Co. v. Croninger, 226 U. S., 491, and Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S., 469, argued and decided in this Court since the writ of certiorari was granted herein, have settled in favor of defendant all questions as to the validity of the $50. limitation, save the effect of actual knowledge on the part of the carrier that the goods were worth more than the valuation adopted for the purpose of fixing the rate.

The doctrine of these cases has repeatedly been reaffirmed. See *e. g.:*

Kansas Southern Ry. *v.* Carl, 227 U. S., 639;

M. K. & T. Ry. *v.* Harriman, *Id.*, 657;
Chicago, Rock Island & Pac. Ry. Co. *v.* Cramer, 232 U. S., 490;
Great Northern Ry. Co. *v.* O'Connor, *Id.*, 508;
Boston & Maine Rd. *v.* Hooker, 233 U. S., 97;
Atchison, &c., Ry. Co. *v.* Robinson, *Id.*, 173.

Both the *Croninger* and *Neiman-Marcus* cases involved the validity of the fifty dollar valuation clause in an express company's receipt. In both it was held, on the authority of the leading case of *Hart* v. *Pennsylvania*, 112 U. S., 331, that such a limitation is valid if fairly made for the purpose of applying to a shipment the lower of two or more rates based upon valuation. As already noted, the *Neiman-Marcus* case involved the identical form of receipt and valuation clause presented in the case at bar.

In the *Croninger* and *Neiman-Marcus* cases the goods were enclosed in a sealed package, so that the carrier had no opportunity to form an estimate of their value. In the case at bar the goods were not so enclosed and it was conceded, subject to defendant's objection to the competency, relevancy and materiality of the testimony, that "the said property was obviously of a value in excess of $50 and that it (*i. e.*, the carrier) knew that same was of a value largely in excess of a thousand dollars" (p. 13). The ques-

tion is presented, therefore, whether actual knowledge by the carrier that the goods are worth more than the valuation adopted for the purpose of fixing the rate takes the case out of the rule laid down in the *Croninger* and *Neiman-Marcus* cases. This we take to be the only aspect of the case requiring serious discussion.

POINT I.

The rights of the parties in respect of the fifty dollar limitation depend upon contract, not estoppel.

It is important to dispose of this question at the outset, in view of the fact that one of the elements of an estoppel *in pais* is lacking in the case at bar, the carrier having been aware that the agreed valuation was less than the actual value.

It has often been said that the ground of decision in such cases is *estoppel.* See, *e. g.*:

> Wells Fargo & Co. *v.* Neiman-Marcus Co., 227 U. S., 469, at p. 476;
>
> Kansas City Southern Ry. Co. *v.* Carl, *Id.*, 639, at p. 651;
>
> Missouri, Kansas & Texas Ry. Co. *v.* Harriman, *Id.*, 657, at p. 668;
>
> Boston & Maine R. R. Co. *v.* Hooker, 233 U. S., 97, dissenting opinion of Pitney, *J.*, at p. 143 *et passim.*

This view, however, was not essential to the decision in any of the cases cited, and appears to have

been based upon a misapprehension of the ground of decision in the leading case of *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S., 331. Thus in the opinion of Commissioner Lane in *Matter of Released Rates*, 13 I. C. C. R., 550, it is asserted: "That decision (*i. e.*, the *Hart* case) was expressly predicated upon the principle of estoppel." We shall show not only (*a*) that this view is not borne out by the opinion in the *Hart* case, but also (*b*) that it is conclusively negatived by the record and briefs in that case.

(a) *The opinion in the Hart case.*

It is true that the question of estoppel was discussed, but the ground of decision was explicitly stated to be contract. The Court said (pp. 337-338):

> "A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was *the 'agreed valuation,' the one on which the minds of the parties met*, &c."

Again at page 340:

> "It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier."

And again at page 343:

> "The distinct ground of our decision in the case at bar is, that *where a contract of the kind, signed by the shipper, is fairly made*, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, *the contract will be upheld* as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." (Italics ours.)

(b) *The Record and briefs in the Hart case.*

It is clear upon an examination of the original record and briefs that estoppel could not have been the ground of decision, because, as in the case at bar, the carrier knew that the agreed valuation was less than the actual value. The shipment consisted of six race horses worth over $30,000. One horse alone was worth $15,000. The agreed valuation (which

this court sustained) was $200 apiece, or $1,200. in all. Plaintiff testified in substance (Record in *Hart* case, pp. 28-30) that the officials who represented the carrier in the transaction were familiar with the horses and knew their value, and related facts and incidents in support of this assertion. The testimony, while perhaps objectionable in form, was admitted without objection, was nowhere denied, and formed the basis of one of the chief arguments of counsel. In his brief for this court counsel for plaintiff in error called attention to the testimony and said (p. 11):

> "The following facts appear from the record and they are not contradicted:
>
> "(a) The property shipped was of much greater value than that named in the printed form of contract.
>
> "(b) *That the carrier or its authorized agents knew this before it received the stock for shipment.*" (Italics ours.)

Again, at page 14 of his brief:

> "Here no representation of value was required; no deception or misleading statement of value was made, *and the shipper knew the value of the property it was to carry, or knew that it was greatly in excess of the sums named in the bill of lading.*"

The question of the carrier's knowledge was therefore before this court and strongly urged upon its at-

tention, and while it is not separately discussed in Justice Blatchford's opinion it must be deemed to have been considered and to be covered by the decision rendered. Read in the light of the record and briefs the opinion shows that the decision was based, not on the theory of an estoppel arising from false representations, but on the broader theory of a *contract* fairly and openly made for the purpose of applying a particular rate.

That the ground of decision in such cases is contract, not estoppel, is clear from the recent case of *Boston & Maine Rd.* v. *Hooker*, 233 U. S., 97. In that case it was expressly found as a fact by the Trial Court "that any reasonable person would infer from the outward appearance of plaintiff's baggage when tendered to the defendant for transportation that the value largely exceeded $100." (p. 107). In other words, one of the essential elements of estoppel was lacking. Nevertheless this Court held, reversing the Supreme Court of Massachusetts, that the shipper must be deemed to have assented to the valuation applicable to the rate paid as set forth in the carrier's schedules published and filed with the Interstate Commerce Commission, and was bound thereby. That the ground of decision in the *Hooker* case was inconsistent with the theory of estoppel, appears even more clearly from a perusal of the able dissenting opinion of Justice Pitney. (See 233 U. S., pp. 135, 142-143.)

In *Atchison, &c., Ry. Co.* v. *Robinson*, 233 U. S.,

173, the trial Court charged the jury on the estoppel theory (p. 179). The charge was disapproved by this Court and the judgment below was reversed, though Justice Day's opinion does not discuss this question.

Turning from particular precedents to considerations of a more general character, it will be seen that the very existence of the right to maintain two rates on the same commodity based on valuation,—a right established by numerous decisions of this Court, —necessarily presupposes that the parties may with full knowledge lawfully agree on a valuation below the actual value, and is therefore inconsistent with the estoppel theory. If that theory were to prevail, there would be no opportunity for two rates except in the limited class of cases where the carrier does not know what it is carrying.

Finally, the enforcement of the estoppel theory would be open to grave practical objections, and would be inconsistent with the purposes of the Interstate Commerce Acts as declared by this Court.

It would be open to practical objection because it would in every case open the door for litigating the question whether or not the carrier, or some agent of the carrier whose knowledge was in law imputable to it, was put upon notice of the actual value of the shipment either by something said or done, or by the method of packing. This would introduce an intolerable situation.

It would be inconsistent with the purposes of the Interstate Commerce Acts because it would interfere

with uniformity of rates and service and make the rate charged and the rights of the parties depend not alone on the service rendered and the filed tariffs, but also on the knowledge of the carrier as to the value of the shipment. In other words it would sanction one rate for the consignment of furs worth $400. involved in *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S., 469, provided they were shipped in a closed package, but condemn the same rate as unlawful if the furs had been shipped in an open package or their value had been otherwise disclosed to the carrier. Moreover it would require that every agent of the Express Company be an expert in appraising the value of all kinds of articles shipped without covering, in order to apply the proper rating, and so would in effect make the judgment of the agent rather than the published tariff determine the rate in each case. That such results would involve discriminations in violation of the spirit of the Interstate Commerce Act and be contrary to the purposes of that Act seems beyond question. What those purposes are has often been declared by this Court. In *Atchison, Topeka & Santa Fe Ry. Co. v. Robinson*, 233 U. S., 173, 181, the Court, refers to them as:

> "the primary purposes of the Interstate Commerce Act so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

POINT II.

The tests of the validity of such a contract are (a) that it shall be fair as between the parties, (b) that it shall not contravene the rule of public policy forbidding a common carrier to stipulate for exemption from responsibility for its own negligence, (c) that it shall not offend against the Interstate Commerce Law. The contract in suit meets these tests.

These general propositions require no demonstration beyond a mere reference to some of the familiar cases in which the tests have been applied. See, *e. g.*, *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S., 331; *Adams Express Co.* v. *Croninger*, 226 U. S., 491; *The Kensington*, 183 U. S., 263; *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S., 155.

We pass at once, therefore, to the concrete question whether the contract in suit meets these tests.

(*a*)

The contract in suit was fair as between the parties.

Little need be said on this point. This is not the case of a weak or ignorant shipper coerced or deluded by the carrier into an unfair agreement. The shipper is a powerful corporation and entered into the agreement after careful and deliberate forethought. The arrangement was of its own choosing. It was familiar with defendant's tariffs (p. 18). It had the option of insuring the shipment for the full excess value with the carrier by paying the tariff rate applicable to such

value, or of placing the insurance elsewhere or carrying its own insurance. It chose the latter alternative, but there was nothing to prevent its choosing the other.

We shall have occasion to say more upon this subject of optional insurance in another place. (See Point II of this brief, subdivision (*c*), *infra.*) We need only add here that the *reasonableness* of defendant's rates and regulations is not at issue in this suit (see Point III, *infra*). As said in *Boston & Maine Rd.* v. *Hooker*, 233 U. S., 97, at page 121:

> "If the charges filed were unreasonable the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission."

(*b*)

The contract in suit does not contravene the rule of law and public policy forbidding a common carrier to stipulate for exemption from responsibility for its own negligence.

This is the point of chief attack in the dissenting opinion below.

At the outset it is important to bear in mind the essential difference between a *limitation of value* for which the carrier will be responsible in any case and an *exemption from liability* for its own negligence, the former an agreement fairly made in which the shipper has his option of fixing the amount of extra insurance

and paying accordingly, the latter an attempt by the carrier to avoid all liability whatever in certain contingencies. This distinction was well pointed out in the *Hart* case, where the court said (112 U. S., p. 340):

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence."

Not all contracts which actually operate to relieve a carrier from liability for negligence are obnoxious to the rule. Otherwise the whole line of cases of which *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S., 331, and *Adams Express Co.* v. *Croninger*, 226 U. S., 491, are typical, were wrongly decided. For in each of these cases a valuation was upheld which did in effect limit the liability of the carrier for its negligence to a small fraction of the actual loss sustained.

These valuations were not upheld because they approximated or bore any relation to the actual value of the shipments. They were upheld on the theory that the rule has no application to a valuation adopted in good faith for the purpose of applying one of two or more rates based on valuation. As said in the *Croninger* case (226 U. S., at p. 510):

> "Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy."

If therefore the contract in suit does conflict with the principle of public policy in question, it must be because the valuation was not adopted in good faith for the purpose of adjusting the rate, but on the contrary was a mere device for evading the law. We submit that the evidence warrants no such inference.

The dissenting judge below assumed that it did, basing his assumption on the admitted discrepancy between the fifty dollar valuation and the actual value of the property. He said (fol. 111):

> "In my opinion a valuation of $50 upon $15,000 worth of property—of known value to both carrier and shipper—is not a valuation at all, but is an arbitrary and unreasonable limitation in the guise of a valuation. * * * While public policy declares that agreements which relieve a carrier from the effects of its negligence 'are contrary to the fundamental principles upon which the law of carriers was established,' nevertheless such exemption may be obtained by going through a form of words —by 'valuing' the most valuable article at a penny!"

Again (fol. 113) he stigmatizes the contract as:

> "An obvious and deliberate evasion."

The difficulty with this view is that it entirely overlooks the nature and history of the fifty dollar limitation. Far from being an "arbitrary and unreasonable limitation in the guise of a valuation" it is the stan-

dard and conventional valuation adopted by express companies as a basis for their primary or lowest rates. The express companies did not invent it. On the contrary it long antedated the oldest of them. As early as 11 George IV and 1 William IV, c. 68, it was provided by statute in England that a carrier should not be liable beyond £10 unless at the time of making the shipment the shipper, if the goods were of greater value, should so declare to the carrier, and pay accordingly. (See *Hinton* v. *Dibbin*, 2 Ad. and E. (N. S.), 646.) Taking the nature of the express business into account, the $50 valuation is a substantial sum and not an undervaluation or attempted evasion. In the majority of cases it probably represents at least the full value of the article carried. At any rate it is a part of the express companies' tariffs, and as such is obligatory upon them until the Interstate Commerce Commission orders otherwise.

In the light of these facts we assert with confidence that no inference of bad faith on the part of the carrier, or attempt by it to evade the law can properly be drawn from the mere application by it of the $50. valuation to any shipment, however costly, on which the shipper refuses to put a different valuation.

To the suggestion of the dissenting judge that if the $50. valuation in this case be sustained "exemption may be obtained by going through a form of words—by 'valuing' the most valuable article at a penny," we

answer that the carrier here did not in fact value the shipment at a penny but at the standard valuation adopted by express companies and imbedded in their tariffs as the basis of their primary rate, and that it will be time enough to discuss the effect of a palpable attempt at evasion when a case arises which presents evidence of such an attempt.

(*c*)

The contract in suit involves no offence on the part of the carrier against the Interstate Commerce Act.

The fundamental object of the Act, as repeatedly declared by this Court, is to secure certainty and uniformity of rates and equal treatment for all. Thus in *Atchison, &c., Ry. Co.* v. *Robinson*, 233 U. S., 173, 181, Justice Day speaks of "the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

The contract in suit does not contravene these purposes. No discrimination in favor of petitioner herein was practised or attempted by the carrier. Any other shipper was at liberty to avail himself of the same rate on the same conditions.

If the law required the carrier in each instance to fairly value the property the result would be uncertainty and inequality: uncertainty, because it would become a question of fact in each case as to whether or

not the valuation arrived at was a fair one; inequality, because in cases like the present the shipper by recovering on a valuation in excess of that assumed for the purposes of the rate would in effect secure a preference or rebate.

The Interstate Commerce Act, however, imposes no such obligation on the carrier. The carrier is required to establish uniform rates open to all alike. Such rates may properly be based on valuation, but the duty of fixing the valuation on a particular shipment for the purpose of applying the corresponding rate is cast, not on the carrier, but on the shipper. In *Kansas Southern Ry. v. Carl,* 227 U. S., 639, the Court said, at page 652:

> "The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. * * * To permit such a declared valuation to be overthrown by evidence *aliunde* the contract for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. *The valuation the shipper declares determines the legal rate* where there are two rates based upon valuation. He must take notice of

the rate applicable, and actual want of knowledge is no excuse." (Italics ours.)

The propriety, in fact the practical necessity, of putting the responsibility for the valuation on the shipper rather than on the carrier is obvious. The facts are peculiarly within the shipper's knowledge, while the carrier's agents cannot be expected to be acquainted with the exact value of every article offered for carriage. Even in a case where the carrier knows the shipment is worth much more than the valuation adopted, the same considerations hold good. Conceding that every one knows a car load of automobiles is worth more than fifty dollars, the difficulty lies in arriving at a definite amount. In the case at bar, as we shall show a little further along, the carrier's tariff included over one hundred and fifty different rates corresponding to differences in value between $50 and the actual value of the shipment. Without information from the shipper, how was it to ascertain which of these hundred and fifty rates was the proper one to be applied?

It may be pertinent at this point to discuss briefly the theory of defendant's rates and the rates of express companies in general.

The basis of express rates is the conventional fifty dollar valuation, which, as we have already seen, is a substantial sum when the nature of the express business is taken into account, and in the majority of cases probably represents at least the full value of the article

carried. On this conventional valuation a general merchandise rate is fixed, which rate is intended to cover the cost of transportation plus insurance against loss or damage to the extent of such valuation. Where a higher value is declared, instead of there being a different and more or less arbitrary rate per hundred pounds as in the case of railroad freight shipments, a charge for value in excess of $50 is made upon a regular ascending scale.

As the case at bar was disposed of at the close of plaintiff's evidence defendant's tariff schedules do not appear in the transcript of record. Their nature, however, is matter of record in the similar case of *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S., 469. At pages 18-19 of the transcript of record in that case the applicable provisions of Wells Fargo & Co.'s tariff are set forth at some length. We quote the following:

> "(*a*) When the value of any merchandise shipment (C. O. D. or otherwise) exceeds $50.00, the following additional charge must be made on the declared value:
>
> " 'Charge for value whether insured or not.'
>
> "(*b*) When merchandise rate is $1.00 or less per 100 lbs., 5 cents for each $100 value, or fraction thereof, minimum 10 cents.
>
> "(*c*) When merchandise rate exceeds $1.00 and not more than $3.00 per 100 lbs., 10 cents for each $100 value or fraction thereof.

"(*d*) When merchandise rate exceeds $2.00 and not more than $8.00 per 100 lbs., 15 cents for each $100 value, or fraction thereof.

"(*e*) When merchandise rate exceeds $8.00 per 100 lbs., 20 cents for each $100 value or fraction thereof."

In other words, as noted in the opinion of the Court (227 U. S., at p. 474), the rate increases by a specified amount for each additional hundred dollars of value. In the present case, therefore, there was a regularly ascending scale of about 155 different rates applicable to the different values between $50 and $15,487.06, the actual value of the shipment.

It will be apparent from the foregoing that the charge for valuation in excess of fifty dollars is in the nature of a charge or premium for *optional insurance* which the shipper may, by declaring actual value, compel the express company to assume, or may if he sees fit assume himself or place with some outside insurance company. That this is an insurance charge and is so regarded by the Interstate Commerce Commission is brought out in their discussion of express rates found in 24 I. C. C., at pages 388, 397, etc. In fact, one of the complaints under investigation by the Commission is there stated to be "excessive insurance charges when shipments are valued at more than $50."

Such being the nature of the express company's charge for value in excess of fifty dollars, *i. e.*, a charge

or premium for additional insurance, there would seem to be nothing inconsistent with the Interstate Commerce Act, so long as all shippers have the same option, in permitting a shipper to place his additional insurance elsewhere than with the carrier if he prefers. If, however, it be held that this option is not open to the shipper; if it is his duty under the statute to declare full value and pay the corresponding rate, thereby placing all his insurance with the carrier, then his refusal to do so is a breach of law which will prevent his recovering from the carrier more than the valuation actually declared. This aspect of the question will be discussed under Point IV, *infra.*

POINT III.

The real question presented by a valuation of $50. as applied to a car-load of automobiles is a question of the reasonableness of the tariff and regulations under which the shipment was made. Under the Interstate Commerce Act that question is devolved upon the Interstate Commerce Commission and the courts are without jurisdiction.

The valuation, however inadequate it may seem, involved merely an application of the carrier's tariff regulations. It was the standard valuation therein provided for shipments when the shipper refuses to declare a different value. It cannot therefore be treated as a sham or fraudulent device, so far as the carrier

is concerned, and the real question becomes one of *reasonableness.*

What impressed the mind of the dissenting Judge below was the apparent *unreasonableness* of a valuation of $50 as applied to a car-load of automobiles. He says (fol. 111):

> "In my opinion a valuation of $50. upon $15,000. worth of property—of known value to both carrier and shipper—is not a valuation at all, but is an arbitrary and *unreasonable* limitation in the guise of a valuation."

But the reasonableness of a rate or tariff regulation is now a question for the Interstate Commerce Commission, not the courts. Otherwise the purposes of the Interstate Commerce Law to secure uniformity and prevent discriminations might be frustrated.

Tex. & Pac. Ry. *v.* Abilene Cotton Oil Co., 204 U. S., 426;
Balt. & Ohio R. R. *v.* Pitcairn Coal Co., 215 U. S., 481;
Robinson *v.* B. & O. R. R., 222 U. S., 506;
Mitchell Coal Co. *v.* Pennsylvania R. R. Co., 230 U. S., 247;
Morrisdale Coal Co. *v.* Penna. R. R. Co., 230 U. S., 304;
Great Northern Ry. *v.* O'Connor, 232, U. S., 508;

Boston & Maine Rd. *v.* Hooker, 233 U. S., 97.

As said in the case first cited (204 U. S., p. 440):

> "If it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

Since this action was begun the whole field of express rates and regulations, including the $50 limitation, has been the subject of exhaustive investigation by the Interstate Commerce Commission. See

In the Matter of Express Rates, Practices, Accounts and Revenue, 24 I. C. C., 380;

Same Matter, on final decision, 28 I. C. C., 131.

As a result of the investigation, some features of the existing express rates and regulations were pronounced unreasonable and new schedules were pro-

mulgated. Among other changes the form of express receipt was amended and a uniform receipt prescribed for use on and after October 15th, 1913. (See 28 I. C. C., p. 138 and Appendix A.) The $50. limitation was qualified so as to be applicable only to shipments weighing not more than 100 pounds. With this qualification it was approved, and it remains to-day, as it was before, the basis of express rates (see 24 I. C. C., at p. 396; 28 I. C. C., at pp. 137-8).

We quote the following from the "Classification Rules" approved by the Interstate Commerce Commission and found at page 5 of Appendix A to the Commission's decision reported in 28 I. C. C., 131:

> "*13. Valuation Charges:*
>
> (*a*) The rates governed by this classification are based upon a value of not exceeding $50 on each shipment of 100 pounds or less, and not exceeding 50 cents per pound, actual weight, on each shipment weighing more than 100 pounds, and the liability of the express company is limited to the value above stated unless a greater value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under the schedules of charges for excess value."

POINT IV.

If the transactions in suit involved a violation of the Interstate Commerce Acts the shipper is the guilty party or at least the parties are in pari delicto and the Court will leave them where it finds them.

Without conceding that the transactions in suit did in fact involve any violation of the Interstate Commerce Acts, and disclaiming any intent on the part of the carrier to violate those statutes, we nevertheless proceed to point out the legal consequences if such violation be deemed to exist.

The prohibitions against false billing, discriminations and preferences contained in the Interstate Commerce Acts apply to carrier and shipper alike. What is unlawful for the one to give is equally unlawful for the other to receive.

Section 10 of the original Interstate Commerce Act as amended (25 Stat., 855, c. 382) provides that

> "Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the

> carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, &c."

The Elkins Act, as amended by the Hepburn Act of June 29, 1906 (34 Stat., 584, c. 3591), provides:

> "It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor."

In *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S., 155, this Court reversed a judgment of the Supreme Court of Illinois in favor of a shipper, and held that re-

lief must be denied on the ground that the contract sued upon involved a discrimination, and as such a violation of the Elkins Act.

In *M. K. & T. Ry.* v. *Harriman*, 227 U. S., 657, the Court said, at page 671:

> "When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. *If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act.*"

In *Ellison* v. *Adams Express Co.*, 245 Ill., 410, goods worth considerably over $50 had been delivered to the Express Company for carriage, under a receipt containing the fifty dollar valuation clause. As in the case at bar the shipper knew that the rate charged would be based upon the valuation and refrained from declaring a greater value. The goods having been lost plaintiff brought suit against the carrier and recovered judgment for their full value. The Supreme Court of Illinois reversed this judgment on the ground that it was founded upon a contract in violation of the Interstate Commerce Act. In the course of its opinion the court said (p. 415):

"Courts of justice will not assist parties who have participated in a transaction forbidden by statute to assert rights growing out of it. There can be no right of recovery upon a contract which is against good morals, forbidden by law or opposed to public policy. The law will not lend its aid to enforce a demand having its origin in a breach of the law itself."

* * * * * *

(P. 417): "The general rule is undoubted which was stated by Lord Mansfield in the case of *Holman* v. *Johnson*, Cowp., 341: 'The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.' No person who has participated in a transaction forbidden by statute will be allowed to assert rights growing out of it. 'Whether the form of action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part' (*Hall* v. *Corcoran*, 107 Mass., 251)."

* * * * * *

"The appellees' action, when all the facts are disclosed, is founded upon a contract knowingly entered into in violation of law. Whatever the form of the action, whether in contract or tort, it had its basis in the contract of carriage. The wrong complained of is the breach of the illegal contract by which the appellees put their property into the possession of the appellant. That

> contract was not only a fraud on the appellant, but an intentional evasion of the Inter-State Commerce act."

In the *Kirby* case (225 U. S., 155) there is a suggestion (see p. 166) that if the declaration had contained a count based upon *negligence* and the judgment had been rested upon that ground and not on breach of contract, there might have been a recovery under the decision in *Merchants' Cotton Press, &c., Co.* v. *Insurance Co.*, 151 U. S., 368, 388. That suggestion cannot avail petitioner here, however, because

(*a*) The cause of action in the case cited (151 U. S., 368), arose in 1887, before the amendments of the Interstate Commerce Law making false billing and the acceptance of rebates and preferences a crime on the part of the shipper.

(*b*) In the case at bar petitioner must be deemed to have elected to proceed on the theory of a breach of contract. For petitioner put in evidence the express receipt or special contract (p. 13), and on no other theory was this relevant or material evidence for plaintiff. It was not necessary in order to prove delivery of the goods to the carrier, for that was expressly admitted (pp. 12-13). Nor was it material or relevant to a cause of action for negligence or conversion.

(*c*) It is a misapprehension to suppose that the petitioner here had any right of action upon grounds independent of contract. If there had been no contract of carriage, express or implied, and defendant

had been carrying the goods free, defendant's liability as to the shipment would not have been that of a common carrier, and it would have been responsible only for loss resulting from gross and wilful negligence, which was not shown here (*Dudley* v. *Camden, &c., Ferry Co.*, 42 N. J. L., 25; *Louisville, &c., R. Co.* v. *Gerson*, 102 Ala., 409).

In other words, the existence of a right of action for negligence, upon the facts shown in this case, depends upon the existence of the relation of shipper to common carrier, and that relation exists only where there is a contract for carriage, express or implied. As there can be no implied contract where there is an express contract between the parties in reference to the same subject matter (see *e. g., Voorhees* v. *Combs*, 33 N. J. L., 494), it follows that any right of action for negligence which petitioner may have is based upon and cannot be independent of the contract in suit.

As said by the Supreme Court of Illinois in the *Ellison* case, *supra* (245 Ill., 410, at p. 417):

> "The appellees' action, when all the facts are disclosed, is founded upon a contract knowingly entered into in violation of law. *Whatever the form of the action, whether in contract or tort, it had its basis in the contract of carriage.*"

This, we submit, is sound reason and sound law. To hold otherwise would be to permit an important question of public policy to turn on the merely technical matter of the form of a pleading.

POINT V.

The equities are all with respondent. To permit petitioner to recover the full value of the shipment would work grave injustice as between the parties and would serve no public interest.

Petitioner had previously sent its carload lots to the Pacific Coast by freight (p. 21), but decided it could do better by shipping by express, refusing to give a valuation and thereby securing the rate applicable to the express companies' standard or conventional valuation of fifty dollars. Petitioner had formerly been in the habit of declaring values, but had discontinued the practice, apparently on the theory that under various decisions of state courts and the ruling of this Court in the Hughes case (191 U. S., 477), it could get the lowest rate and still hold the carrier for full value in case of loss. Petitioner's representative testified: "I told him I understood the law was that the transportation company was responsible for stuff after they accepted it and gave us a receipt for it" (p. 25). Be this as it may, however, it clearly appears that the action of the shipper in refusing to declare the value of the shipment was taken with deliberate forethought and was not induced by anything done or said on behalf of the carrier.

Under these circumstances, it would work injustice and encourage unfair dealing to permit petitioner to recover the full value claimed.

The rule of public policy invoked by petitioner (that a carrier may not lawfully stipulate for exemption from responsibility for negligence), being a rule restraining absolute freedom of contract, was built up as a protection for the weak—for the ordinary shipper and citizen who deals with a carrier at a disadvantage. It was never intended as a weapon in the hands of the strong and sophisticated to enable him to gain a preference over his less informed neighbor, and to defraud the carrier.

In the previous argument before this court counsel for petitioner urged, as an offset to the obvious equities of this particular case, the importance of the public interest involved. We submit that no important public interest is involved. This form of express receipt is no longer in use, having been superseded by the uniform receipt prescribed by the Interstate Commerce Commission, under which it would be impossible for a shipper to ship or a carrier to carry a carload of automobiles, or anything else weighing more than 100 pounds, on a valuation of $50. (See 28 I. C. C., 137, and Appendix A.)

The case, therefore, is of little importance so far as the future conduct of the express business is concerned, and may properly be decided with an eye solely to the equities between the immediate parties.

POINT VI.

The other questions sought to be raised by Petitioner do not require serious discussion, as will appear from the following brief comments on Petitioner's Points.

The argument (see Point II of Petitioner's principal brief) based on the use in the express receipt of the phrase "gross negligence" is sufficiently answered in the prevailing opinion below (see Record, pp. 59, 61).

Moreover, the reasoning designed to show that the shipper was not offered a reasonable alternative is self-destructive. For if it be conceded, as plaintiff claims, that a clause in the receipt purports to exempt the carrier altogether from liability for ordinary negligence, it follows from other portions of plaintiff's argument that such attempted exemption would be invalid, and that the shipper in reality had the alternative of "full unrestricted common law liability."

Furthermore, as has already been pointed out, this Court in *Wells Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S., 469, has sustained the validity of a receipt identical in phraseology.

As to the argument based on an alleged conversion of the metal salvage from the fire (see Petitioner's principal brief Point V, supplemental brief Point I) we reply: (*a*) no such cause of action was pleaded; (*b*) there is no evidence on which the jury could have found that the alleged salvage had any value; (*c*) the

express receipt provided "*nor in any event* shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued."

In Point I of Petitioner's supplemental brief the theory is advanced that the failure to complete the transportation of the alleged salvage was a renunciation or "wilful abandonment" of the contract of carriage which precluded the carrier from taking advantage of the contract and relieved the shipper from its obligations thereunder. We deem it unnecessary to go into the merits of this theory because it comes too late, being advanced for the first time in this court. It is familiar law that a defeated litigant cannot be heard in the court of last appeal upon a theory not suggested in the courts below (see *e. g.*, *Salisbury* v. *Howe*, 87 N. Y., 128).

In Point II of Petitioner's supplemental brief stress is laid on the Carmack Amendment, and it seems to be assumed that this amendment has changed the law with respect to agreed valuations. We do not so understand the Carmack Amendment. Its effect (apart from making the initial carrier responsible for the acts of connecting carriers as its agencies) was to bring the whole subject of carrier liability in interstate commerce within federal regulation and subject to uniform rules of law as previously laid down by the federal courts. It did not change those rules of law. What they are has already been sufficiently discussed.

In Points III, IV, and V of Petitioner's supplemental brief, argument is based on the provisions of defendant's tariffs, of which the Court is asked to take judicial notice. The argument proceeds throughout on the assumption that defendant's tariffs are based, not on the valuation declared by the shipper, but on actual value. Hence the proposition (found at page 29 of the supplemental brief and reiterated elsewhere in various forms): "So we must assume in this case that on the arrival of this shipment in San Francisco the defendant, knowing its duty, would have charged the rate applicable to a shipment worth over $15,000." This assumption comes awkwardly from a shipper who had refused to name a valuation other than $50 for the express purpose of taking advantage of the carrier's rate applicable to that valuation. Moreover, it is unsound, because it assumes that the obligation to value the shipment rests on the carrier, whereas, as we have already shown (see p. 18 of this brief) the law casts that obligation not on the carrier but on the shipper. As said in the *Carl* case (227 U. S., p. 652) "the valuation the shipper declares determines the legal rate."

Defendant's tariffs are in conformity with this proposition.

Thus the first rule in defendant's Classification in force at the time of shipment is as follows:

> "1. (*a*) GIVE A RECEIPT OF THE PRESCRIBED FORM for all matter received. ALWAYS ASK

> SHIPPERS TO DECLARE THE VALUE, and when given insert it in the receipt, mark it on the package and enter amount on the way-bill. If shippers refuse to state value, write or stamp on the receipt "VALUE ASKED AND NOT GIVEN."

Rule 10, entitled "VALUATION CHARGES ON MERCHANDISE" has already been quoted on page 20 of this brief from the record in the case of *Wells Fargo & Co.* v. *Neiman-Marcus Co.* We repeat a portion of it here with the significant words italicized:

> "10. VALUATION CHARGES ON MERCHANDISE: (*a*) When the value of any merchandise shipment (C. O. D. or otherwise) exceeds $50.00, the following additional charge must be made *on the declared value.*"

(NOTE.—Assuming that the Court will take judicial notice of defendant's tariffs as requested in petitioner's supplemental brief, we shall ask leave to submit a certified copy of the classification in force at the date of shipment. It will be found to differ somewhat in arrangement and phraseology from the excerpts printed in petitioner's supplemental brief, which apparently were taken from a tariff of an earlier date.)

In Point VI of Petitioner's supplemental brief reliance is placed on the estoppel theory. This has already been sufficiently discussed under Point I, *supra.*

In Point VII of Petitioner's supplemental brief it is claimed that the Interstate Commerce Commission (*Matter of Released Rates,* 13 I. C. C., 550) had al-

ready declared unreasonable the provisions of defendant's tariff under which the shipment in suit was made.

Without discussing the nature or effect of that ruling (which in fact does not purport to be a ruling but merely an expression of views) it suffices to say that it was not announced until 1908, whereas the present action was commenced in 1907 (Record, p. 1).

In Point VIII of Petitioner's supplemental brief various cases are cited in which parties to unlawful contracts have been permitted to recover where they had a right of action upon grounds independent of the contract or where the suit proceeded upon the theory of a disaffirmance of the contract. None of these cases, we submit, is applicable to the case at bar, where, as we have endeavored to show (Point IV, *supra*), plaintiff's action necessarily has its basis in the contract of carriage.

IN CONCLUSION.

The judgment should be affirmed.

CHARLES W. PIERSON,
CHARLES W. STOCKTON,
WILLIAM W. GREEN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

No.

THE GEORGE N. PIERCE COMPANY, Petitioner,

vs.

WELLS FARGO & COMPANY.

[illegible]

ALFRED L. BECKER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 14.

THE GEORGE N. PIERCE COMPANY, Petitioner,

vs.

WELLS FARGO & COMPANY.

MEMORANDUM FILED BY PETITIONER IN EXPLANATION OF EXTRACTS FROM TARIFFS FILED BY PERMISSION OF THE COURT.

Classification (I. C. C. No. 1, p. 16) shows that the rate on automobiles uncrated was double merchandise rate.

Record, page 16, shows that the automobiles shipped were uncrated.

Tariff I. C. C. No. 10, title page, section 1, shows that a through rate could be made by combination of rates from basing point to point of origin and from basing point to destination.

I. C. C. No. 10, New York section, page 3, shows merchandise rate from Chicago (basing point) to Buffalo; I. C. C. No. 10, California section, page 20, shows merchandise rate from Chicago (basing point) to San Francisco:

Chicago to Buffalo................	$1.75	
Chicago to San Francisco..........	11.50	
Total per 100 lbs..............	13.25	
Doubled equals................	$26.50	per 100 lbs.

Using Kansas City as basing point:

Kansas City to Buffalo.............	$3.75	
Kansas City to San Francisco.......	9.50	
Total per 100 lbs..............	13.25	
Doubled equals................	$26.50	per 100 lbs.

I. C. C. No. 67, page 4293, giving special commodity rate on automobiles in carloads, Buffalo to San Francisco, $8.00 per 100 pounds, minimum $1,000, was not filed until June 29, 1907, nearly two months after the shipment in question.

The record does not show the weight of the shipment. If it was 18,000 pounds the double merchandise rate would be $2,385. Under the tariff (special commodity rate) not filed until after the shipment, the rate would be on 18,000 pounds, $1,440.

Valuation Tariff.

Additional charge for value in excess of $50 on rate of $8.00 per 100 pounds or over was $0.20 per $100.

Value of shipment, $15,487.06.

Rate for $15,437.06 in excess of $50 would be $31.

Respectfully submitted,

ALFRED L. BECKER,
Counsel for Petitioner.

GEORGE N. PIERCE COMPANY, PETITIONER, *v.* WELLS, FARGO & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 14. Argued December 8, 1913. Restored to docket October 26, 1914. Reargued January 7, 1915.—Decided February 23, 1915.

One who deliberately without fraud or imposition accepts a contract of shipment limiting the recovery to a valuation specified in the filed tariff, but who is given the privilege of paying increased rates for increased valuation and liability up to full amount as also specified in the filed tariff, is limited in case of loss to recover the specified amount.

Contracts for limited liability when fairly made do not contravene the settled principles of the common law preventing the carrier from contracting against liability for its own negligence. *Hart* v. *Pennsylvania R. R.*, 112 U. S. 331.

Under the provisions of the Act to Regulate Commerce in regard to filing tariffs and the Carmack Amendment of 1906 to that Act, the amount to which the liability of the carrier is limited and the additional rate for additional liability must be stated in the filed tariff and must be equally applicable to all shippers under like circumstances.

The legality of a contract limiting the carrier's liability to a specified or agreed valuation does not depend upon that valuation having a relation to the value of the shipment, but depends upon acceptance of the parties to the contract and upon the filed tariff and the re-

quirement of the shipper to take notice thereof and to be bound thereby.

If the filed tariff specifies an amount as the carrier's liability which is unreasonable, it is for the Interstate Commerce Commission to correct upon proper proceedings, but it stands until so corrected and all shippers under like circumstances must be treated alike.

While the fifty dollar limit of value of the shipment and of express companies' liability for shipments of undeclared value at regular rates has been modified by the Commission since the shipment in this case, it was then the filed tariff limitation and the shipper was bound to take notice thereof; and to permit a greater recovery than the amount specified in the filed tariff would result in the very favoritism towards him that it is the purpose of the anti-discrimination provisions in the Act to Regulate Commerce to avoid.

The rule that conclusiveness of filed tariff rates does not relate to attempted fraudulent acts or billings, has no application where, as in this case, the transaction was open and above board and the character of the goods was known to both parties and the shipper was competent to agree to the lower valuation in consideration of the lower rate.

A contention as to liability of the carrier for value of wreckage which was not presented on the pleadings nor involved in the disposition of the case by the court below cannot be considered here.

189 Fed. Rep. 561, affirmed.

THE facts, which involve the validity of clauses in express receipts limiting the liability of the carrier to a fixed amount in absence of declared valuation and payment of a higher rate, are stated in the opinion.

Mr. Alfred L. Becker, with whom *Mr. William B. Hoyt*, *Mr. Maurice C. Spratt* and *Mr. John W. Yerkes* were on the brief, for petitioner.

Mr. Charles W. Pierson, with whom *Mr. William W. Green*, *Mr. L. A. Doherty* and *Mr. Charles W. Stockton* were on the brief, for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

This action was begun in the Circuit Court of the United States for the Western District of New York, to recover